1255(i). That contention does not warrant this Court's review.

1. The court of appeals in this case correctly upheld the BIA's determination that an alien who is inadmissible under Section 1182(a)(9)(C)(i) is ineligible to apply for adjustment of status under Section 1255(i). As the court explained, when Congress enacted Section 1255(i) in 1994 and permitted aliens who enter without inspection to seek adjustment of status in certain situations, the INA did not deem inadmissible an alien who had entered the country without inspection. There is no basis for concluding that, when Congress later amended Section 1182(a)(6)(A) to provide that an alien who enters without inspection is inadmissible, Congress thereby sought to nullify Section 1255(i), the sole purpose of which was to permit aliens who entered without inspection to seek adjustment of status.

Inadmissibility under Section 1182(a)(6)(A) differs from inadmissibility under Section 1182(a)(9)(C)(i)(I) in that, treating an alien who is inadmissible under the latter provision as ineligible to apply for adjustment of status would not have the effect of wholly nullifying Section 1255(i). It instead would render ineligible for adjustment of status a particular category of aliens who are present in the United States without having been admitted, *i.e.*, those aliens that have unlawfully *re*entered the country and have accrued more than one year of unlawful presence. In light of that distinction between Section 1182(a)(9)(C)(i)(I) and Section 1182(a)(6)(A), and because Congress imposed significantly greater penalties on aliens who are inadmissible under the former provision, see pp. 2-3, *supra*, the BIA reasonably concluded that an alien who is inadmissible under that provision is ineligible to apply for adjustment

of status even though an alien inadmissible under Section 1182(a)(6)(A) retains eligibility to seek adjustment of status. See Pet. App. 13-18.

2. Petitioner contends (Pet. 9-11) that the court of appeals' opinion in this case conflicts with the Ninth Circuit's opinion in *Perez-Gonzalez* v. *Ashcroft*, 379 F.3d 783 (2004). There is no square conflict between the two decisions.

In *Perez-Gonzalez*, the alien unlawfully reentered the country without inspection and the government reinstated his previous removal order pursuant to 8 U.S.C. 1231(a)(5). Under that provision, an alien whose previous removal order is reinstated is deemed ineligible for "any relief." 8 U.S.C. 1231(a)(5). The Ninth Circuit nonetheless ruled that the alien could apply for adjustment of status under Section 1255(i) because he had filed a request to reapply for admission before the government reinstated his removal order. 379 F.3d at 789. The court rejected the government's contention that the alien was ineligible to apply for adjustment of status because he was inadmissible under Section 1182(a)(9)(C)(i) as an illegal reentrant who had accrued more than one year of unlawful presence. The court reasoned that the government's position was contained in an internal guidance memorandum, and that "[a]gency interpretations contained in [such] informal formats * * * are only entitled to 'some deference' as opposed to the rigorous deference owed formal agency interpretations under *Chevron*." *Id.* at 793. The court believed that the government's position was inconsistent with a DHS regulation. *Id.* at 793-794 (discussing 8 C.F.R. 212.2). The court ruled that, "[i]n the absence of a more complete agency elaboration," an alien who is inadmissible under

Section 1182(a)(9)(C)(i) can seek adjustment of status pursuant to Section 1255(i). *Ibid.*

In *Perez-Gonzalez*, there was no formal adjudication before an IJ or decision of the BIA because the alien's previous removal order had been reinstated without a hearing pursuant to 8 U.S.C. 1231(a)(5). In this case, by contrast, an IJ conducted removal proceedings and ordered petitioner removed, and the BIA sustained the IJ's decision and explained why petitioner's inadmissibility under Section 1182(a)(9)(C)(i) renders him ineligible to apply for adjustment of status under Section 1255(i). See Pet. App. 21-22. The court of appeals thus accorded *Chevron* deference to the BIA's conclusion that an alien who is inadmissible under Section 1182(a)(9)(C)(i) is ineligible to seek adjustment of status. See *id.* at 6-7, 12, 18. See generally *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (holding that BIA decisions are entitled "to *Chevron* deference as [the BIA] gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication") (internal quotation marks omitted). Because the court of appeals in this case applied *Chevron* deference to the BIA's interpretation of the relationship between Sections 1182(a)(9)(C)(i)(I) and 1255(i), whereas the Ninth Circuit in *Perez-Gonzalez* declined to accord *Chevron* deference to the government's position on that issue in the absence of a formal agency interpretation, the two decisions are not in square conflict.

There also is no square conflict between the decision below and the Tenth Circuit's recent decision in *Padilla-Caldera* v. *Gonzales*, No. 04-9573, 2005 WL 2651385 (Oct. 18, 2005), which was issued after the filing of the petition in this case. In *Padilla-Caldera*, the Tenth Circuit held that an alien who is inadmissible under Section

1182(a)(9)(C)(i)(I) nonetheless retains eligibility to apply for adjustment of status under Section 1255(i). The Tenth Circuit, like the Ninth Circuit in *Perez-Gonzalez*, declined to accord *Chevron* deference to the government's contrary position, reasoning that the government's position was reflected in an internal memorandum and thus was "not owe[d] rigorous deference." *Id.* at *5. In addition, the court did not address —and thus did not reject—the reasoning adopted by the BIA in this case and upheld by the court of appeals below, *viz.*, that Section 1255(i) contemplates a "one-time waiver" for aliens who enter without inspection but does not extend to an alien who is inadmissible under Section 1182(a)(9)(C)(i) after having unlawfully *re*entered the country without inspection. Pet. App. 21; see *id.* at 16-18. Indeed, the Tenth Circuit had adhered to that distinction in a previous decision holding that an alien who is inadmissible under 8 U.S.C. 1182(a)(9)(C)(i)(II) is ineligible to apply for adjustment of status under Section 1255(i). See *Berrum-Garcia* v. *Comfort*, 390 F.3d 1158, 1167 (2004) (distinguishing between "aliens who are guilty only of illegal entry (the 'first-time' offense)" and aliens "who have reentered in spite of a prior removal order").[3]

---

[3] The Tenth Circuit in *Padilla-Caldera* sought to distinguish that court's previous decision in *Berrum-Garcia* on the basis that the former case concerned inadmissibility under Section 1182(a)(9)(C)(i)(I) while the latter case concerned inadmissibility under Section 1182(a)(9)(C)(i)(II). See 2005 WL 2651385, at *5. There is no material distinction between those provisions. The former provision applies to aliens who reenter without inspection and have accrued over one year of unlawful presence, and the latter provision applies to aliens who reenter without inspection after having been ordered removed. Inadmissibility on either ground should have the same consequences with respect to eligibility for adjustment of status under Section 1255(i).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

OCTOBER 2005

See Pet. App. 17 n.9 (observing that, although this case involves Section 1182(a)(9)(C)(i)(I) and *Berrum-Garcia* involved Section 1182(a)(9)(C)(i)(II), "this is a distinction without a difference").

Supreme Court, U.S.
FILED
NOV - 7 2005
OFFICE OF THE CLERK

No. 05-148

In The

Supreme Court of the United States

JESUS MORTERA-CRUZ,

Petitioner,

v.

ALBERTO R. GONZALES,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

LANCE CURTRIGHT, ESQ.
TX 24032109
JOSEPH B. DE MOTT & ASSOCIATES, LLP
8930 Fourwinds, Suite 106
San Antonio, Texas 78239
(210) 354-1844
fax: (210) 212-2116

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REPLY BRIEF 1

I. The Fifth Circuit's decision in *Mortera-Cruz* is in conflict with the Tenth Circuit's decision in *Padilla-Caldera* and the Ninth Circuit's decision in *Perez-Gonzalez* 1

A. There is a split between the Fifth and Tenth Circuits because they addressed the same issue and reached a different result 1

B. There is a split between the Fifth and the Ninth Circuits because *Mortera-Cruz*'s reasoning disagrees with the reasoning in *Perez-Gonzalez* 3

II. This court should accept certiorari to redress a wrongly decided decision, which affects thousands of families in this country, and casts an appearance of impropriety upon the government 5

A. Nothing in the language of § 1255(i) limits its application to aliens who entered the country without inspection just once 5

B. The presumption that the interplay between § 1182(a)(6)(A) and § 1182(a)(9)(C)(i)(I) result in § 1255(i) to only apply to aliens who entered the United States illegally on one occasion is demonstrably wrong 6

C. The myth that § 1255(i) only applies to aliens who entered the United States without inspection on one occasion cannot survive any serious scrutiny 9

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Berrum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004) 2, 3

Chevron USA Inc. v. Natural Resources Council, 467 U.S. 837 (1984) 1, 2, 4

In Re: Arnulfo Lozano-Jimenez, 2005 WL 1104214 (BIA 2005) 4

In Re: Juan Zuniga-Tapia, 2005 WL 1104573 (BIA 2005) 4

Mortera-Cruz v. Gonzales, 409 F.3d 246 (5th Cir. 2005) ..... *passim*

Padilla-Caldera v. Gonzales, 2005 WL 2651385 (10th Cir. Oct. 18, 2005) 1, 2, 3, 4

Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004) 1, 3, 4

STATUTES:

8 U.S.C. § 1182(a)(6)(A) 6, 7, 8

8 U.S.C. § 1182(a)(9)(C)(i)(I) ..... *passim*

8 U.S.C. § 1231(a)(5) 3

8 U.S.C. § 1255(i) ..... *passim*

REPLY BRIEF

The government provides essentially two reasons for its position that this court should not accept certiorari over Mortera-Cruz's case. One, it maintains that the Fifth Circuit's decision in *Mortera-Cruz v. Gonzales*, 409 F.3d 246 (5th Cir. 2005) does not conflict with the Tenth Circuit's recent decision in *Padilla-Caldera v. Gonzales*, 2005 WL 2651385 (10th Cir. Oct. 18, 2005) or the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Two, the government claims that *Mortera-Cruz* was correctly decided and should be left undisturbed. Mortera-Cruz respectfully submits this reply brief.

I. The Fifth Circuit's decision in *Mortera-Cruz* is in conflict with the Tenth Circuit's decision in *Padilla-Caldera* and the Ninth Circuit's decision in *Perez-Gonzalez*.

A. There is a split between the Fifth and Tenth Circuits because they addressed the same issue and reached a different result.

The government maintains that there is "no square conflict" between *Mortera-Cruz* and *Padilla-Caldera* because (1) *Padilla-Caldera*, unlike *Mortera-Cruz*, declined to provide deference to the agency's decision pursuant to this court's decision in *Chevron USA Inc. v. Natural Resources Council*, 467 U.S. 837 (1984) and (2) *Padilla-Caldera* did not expressly reject the *Mortera-Cruz* rule that § 1255(i) only applies to aliens who entered the country without inspection on one occasion. Contrary to the government's position, *Mortera-Cruz* and *Padilla-Caldera* are in square conflict.

In *Chevron*, this court determined that when reviewing an agency's decision construing a statute, a reviewing court should conduct a two-step process. First, the reviewing court should analyze the language of the statute and determine, by using traditional methods of statutory construction, whether the statutory language is unambiguous. If so, then the court's duty is to simply apply the language of the statute according to its terms. If, however, the court determines that the statutory language is ambiguous, then the court should defer to the agency's interpretation of the statute, unless the agency's interpretation is irrational or arbitrary. *Mortera-Cruz* and *Padilla-Caldera* disagree whether the statutory interplay between 8 U.S.C. § 1255(i) and 8 U.S.C. § 1182(a)(9)(C)(i)(I) is ambiguous. In *Mortera-Cruz*, the Fifth Circuit found an ambiguity in the interplay between the provisions. Therefore, *Mortera-Cruz*, after finding that the BIA's decision was not arbitrary or irrational, deferred to the BIA's decision that § 1182(a)(9)(C)(i)(I) does apply to § 1255(i) eligible aliens. *Padilla-Caldera*, on the other hand, determined that there was no ambiguity between the provisions. By applying traditional rules of statutory construction, *Padilla-Caldera* determined that § 1255(i) eligible aliens are not inadmissible under § 1182(a)(9)(C)(i)(I). Inasmuch as these cases disagree whether the statutory language is ambiguous *and* reach diametrically opposed conclusions, a pure split exists among the circuits requiring this court's intervention.

Padilla-Caldera is particularly important because it specifically ruled that its previous decision in *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004), a case heavily relied upon by the Fifth Circuit in *Mortera-Cruz*, does not alter its conclusion that § 1255(i) eligible aliens

are not inadmissible under § 1182(a)(9)(C)(i)(I). *Padilla-Caldera* rightly noted that *Berrum-Garcia* confronted paragraph (II) of § 1182(a)(9)(C)(i), not (I). Paragraph (II) concerns aliens who were previously removed from the United States, while paragraph (I) does not require a removal order to apply. Federal law provides that an alien who illegally enters the United States after having been previously removed from the country "may not apply for any relief under this chapter." 8 U.S.C. § 1231(a)(5). This provision, *Berrum-Garcia* concluded, provides that aliens who were previously removed from the United States cannot apply for relief under § 1255(i). *Padilla-Caldera*, like the case before this court, concerns paragraph (I) of § 1182(a)(9)(C)(i), not (II). Paragraph (I), in turn, does not concern aliens who were previously removed. Therefore, aliens inadmissible under paragraph (I) of § 1182(a)(9)(C)(i) are not subject to the § 1231(a)(5) bar and can apply for relief under § 1255(i). In short, the Tenth Circuit's decision in *Padilla-Caldera* specifically clarifies that its decision in *Berrum-Garcia* does not suggest that paragraph (I) of § 1182(a)(9)(C)(i) applies to § 1255(i) eligible aliens, the Fifth Circuit's erroneous conclusion in *Mortera-Cruz* notwithstanding.

B. There is a split between the Fifth and the Ninth Circuits because *Mortera-Cruz*'s reasoning disagrees with the reasoning in *Perez-Gonzalez*.

Although the government concedes that *Perez-Gonzalez* rejected its contention that § 1182(a)(9)(C)(i)(I) applies to § 1255(i) eligible aliens, it maintains that the decision does not conflict with *Mortera-Cruz*, which specifically concluded that § 1255(i) eligible aliens *are* inadmissible under

§ 1182(a)(9)(C)(i)(I). The government again claims that this court should determine that there is no conflict because the Ninth Circuit, unlike *Mortera-Cruz*, found no governmental agency rule which merited *Chevron* deference. This court, however, is concerned with maintaining uniformity of law, not uniformity of thought. Unpublished BIA case law clearly provides that the law is not being applied the same way in the Ninth Circuit's jurisdiction as it is in the Fifth Circuit's jurisdiction. Compare *In Re: Juan Zuniga-Tapia*, 2005 WL 1104573 (BIA 2005), an unpublished BIA decision emanating from the Ninth Circuit with *In Re: Arnulfo Lozano-Jimenez*, 2005 WL 1104214 (BIA 2005), an unpublished BIA decision emanating from the Fifth Circuit. In *Zuniga-Tapia*, the BIA stated:

> We agree with the respondent that his inadmissibility under section 212(a)(9)(C) [1182(a)(9)(C)] of the Act would not render him ineligible for adjustment of status under section 245(i) [1255(i)] of the Act pursuant to the reasoning of the Ninth Circuit in *Perez-Gonzalez*.

By stark contrast, the BIA stated in *Lozano-Jimenez* that it would not apply *Perez-Gonzalez* outside of the Ninth Circuit in its decision that § 1182(a)(9)(C)(i)(I) applies to § 1255(i) eligible applicants. These cases show that federal law is not being applied uniformly. Rather, § 1255(i) eligible aliens are treated differently in the Fifth Circuit than they are in the Ninth and Tenth Circuits. Such inconsistency in the application of federal law requires this court's intervention.

II. This court should accept certiorari to redress a wrongly decided decision, which affects thousands of families in this country, and casts an appearance of impropriety upon the government.

Contrary to the government's opposition, the rule adopted by the Fifth Circuit in this case, that § 1255(i) was intended to apply only to aliens who illegally entered the United States on one occasion, is manifestly erroneous. Congress did not place a numerical limitation upon the application of § 1255(i); this concept is rather the judicial invention of a one-member panel of the BIA. The Fifth Circuit should have applied the words of the statute, not the judicial creation of the BIA.

A. Nothing in the language of § 1255(i) limits its application to aliens who entered the country without inspection just once.

Section 1255(i) allows aliens "who entered the United States without inspection" to adjust their status if the alien is the beneficiary of a visa petition filed on or before April 30, 2001 and was physically present in the United States on December 21, 2000. The phrase "who entered the United States" does not limit § 1255(i) to aliens who entered the United States on one occasion; rather "who entered" is simply referring to the alien's last entry.

The concept that § 1255(i) only applies to aliens who illegally entered the United States on one occasion has absolutely no legal precedent. Instead of concocting a new method of interpreting § 1255(i), the BIA should have simply applied the statutory terms and mechanisms provided to it. The structure of the Immigration and

Nationality Act provides that when the paragraphs of § 1182(a) conflict with other sections of the Code, they are inapplicable.[1] The savings clause, in this case, provides that § 1255(i) eligible aliens are not inadmissible under § 1182(a)(9)(C)(i)(I). This statutory solution is plain and unambiguous.

Finally, if aliens, inadmissible under § 1182(a)(9)(C)(i)(I), are statutorily eligible to apply for adjustment of status, they will still need to establish that they merit this benefit as a matter of discretion. An alien with multiple illegal entries into the United States will need to have exceptional family ties and extraordinary equities in order to adjust their status. This statutory scheme, moreover, provides proper consideration to both the goals of § 1255(i) and § 1182(a)(9)(C)(i)(I). The Immigration Judge ("IJ") will consider, on a case-by-case basis, whether our nation's interest in maintaining family unity or the interest in penalizing habitual illegal entrants should prevail. This is precisely what Congress intended.

B. The presumption that the interplay between § 1182(a)(6)(A) and § 1182(a)(9)(C)(i)(I) result in § 1255(i) to only apply to aliens who entered the United States illegally on one occasion is demonstrably wrong.

The government's argument that § 1255(i) only applies to aliens who entered without inspection on one

---

[1] Section 1182(a)'s savings clause says that its paragraphs apply, "Except as otherwise provided in this Act. . . ." The savings clause should operate in this case because § 1182(a)(9)(C)(i)(I) is providing otherwise than is provided in § 1255(i).

occasion, appears to stem from an erroneous interpretation of the interplay between 8 U.S.C. § 1182(a)(6)(A)[2] and § 1182(a)(9)(C)(i)(I). The government begins with the correct premise that § 1255(i) eligible aliens are not inadmissible under § 1182(a)(6)(A) on account of § 1182(a)'s savings clause. Application of § 1182(a)(6)(A) to § 1255(i) would make § 1255(i) a nullity. The government then claims that § 1182(a)(9)(C)(i)(I) applies to aliens with multiple illegal entries. However, § 1182(a)(9)(C)(i)(I)'s application to § 1255(i) will not render the latter a nullity because aliens who entered the country without inspection on just one occasion could still adjust their status under § 1255(i). Thus, the government somehow concludes that § 1255(i) only applies to aliens who entered the United States without inspection on one occasion. This reasoning is entirely erroneous.

Section 1182(a)(6)(A) applies to aliens who entered the United States without inspection on multiple occasions, just as it does to those aliens who entered the United States without inspection on just one occasion. An alien with multiple illegal entries, furthermore, could theoretically be inadmissible under § 1182(a)(6)(A), but not under § 1182(a)(9)(C)(i)(I). Such an alien can adjust under § 1255(i) because, as the government concedes, § 1182(a)(6)(A) does not apply to § 1255(i) eligible aliens. Consider, for example, an alien who enters the United States without inspection on multiple occasions, but only accrues 120 days of unlawful presence under § 1182(a)(9)(C)(i).

---

[2] 8 U.S.C. § 1182(a)(6)(A) provides that "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."

Presume further that the alien is otherwise eligible to adjust his or her status under § 1255(i). Insofar as § 1182(a)(6)(A) does not apply to § 1255(i) eligible aliens, such aliens are statutorily eligible to adjust their status under § 1255(i), even though they entered the United States on more than one occasion. No ground of inadmissibility prevents the adjustment. As such, § 1255(i), under the government's own construction, cannot possibly be limited to just those aliens who entered the United States without inspection on one occasion.

Nor does *Mortera-Cruz*'s claim that § 1255(i) only applies to aliens who entered the United States on one occasion necessarily mean that § 1255(i) does not trump § 1182(a)(9)(C)(i)(I). The inadmissibility ground does not require multiple illegal entries in order to apply. For example, suppose an alien who enters the United States *lawfully* with a non-immigrant visa and then overstays. If such an alien accumulates over one year of unlawful presence after overstaying his or her visa, leaves the United States, and then reenters without inspection, then he or she will be inadmissible under § 1182(a)(9)(C)(i)(I). Presume further that the alien is otherwise qualified to apply for adjustment of status under § 1255(i). Such an alien can adjust his or her status under the *Mortera-Cruz* rule because he or she only made one unlawful entry into the United States. In this instance, § 1182(a)(9)(C)(i)(I) would be trumped by § 1255(i).

The judicially created concept that § 1255(i) only applies to aliens who illegally entered the United States on one occasion is not only unprecedented and without Congressional support, it confuses the issue. At times, § 1255(i) eligible aliens will be considered inadmissible under § 1182(a)(9)(C)(i)(I), and other times, § 1182(a)(9)(C)(i)(I)

will be trumped by § 1255(i). Far from creating a bright line rule, the BIA's impermissible divergence from unambiguous statutory language clouds the issue. A more correct outcome – an outcome based upon the statutory language legislated by Congress – was followed in the Ninth and Tenth Circuits. This court should accept certiorari over this case to ensure that the Ninth and Tenth Circuits' correct interpretation of the laws is also applied to people residing in the Fifth Circuit's jurisdiction.

C. The myth that § 1255(i) only applies to aliens who entered the United States without inspection on one occasion cannot survive any serious scrutiny.

Since 1994, § 1255(i) has applied to aliens with multiple illegal entries. This was the constant interpretation of the provision until a one-member panel of the BIA decided Mortera-Cruz's case and created the additional requirement that an alien can only adjust their status if he or she entered the United States without inspection on one occasion. This myth is not supported by the statutory language, precedent, principles of statutory construction and is demonstrably wrong.

CONCLUSION

This court should accept certiorari over this case. Contrary to the government's position, there is a pure split between the circuit courts, triggering this court's duty to maintain uniformity of law. Not only is *Mortera-Cruz* at odds with decisions from its sister circuits, it advances a demonstrably erroneous rule. It is worth noting, moreover,